The City of New York

POLICE DEPARTMENT

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In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Dean Pattona	:	ORDER
Tax Registry No. 907431	:	OF
Military & Extended Leave Desk	:	DISMISSAL

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Police Officer Dean Pattona, Tax Registry No. 907431, Shield No. 18749, Social Security No. [redacted], having been served with written notice, has been tried on written Charges and Specifications numbered 85554/09 as set forth on P.D. 468-121, dated June 15, 2009, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Dean Pattona from the Police Service of the City of New York.

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: @0001 Hrs on 01/05/2011

The City of New York

POLICE DEPARTMENT

October 20, 2010

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In the Matter of the Disciplinary Proceedings : Case No. 85554/09

- against - :

Police Officer Dean Pattona :

Tax Registry No. 907431 :

Military & Extended Leave Desk :

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At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department: David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Philip J. Smallman, Esq.
32 Court Street – Suite 1702
Brooklyn, New York 11201

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before the Court on June 22, 2010, and August 10, 2010, charged with the following:

1. Said Police Officer Dean Pattona, assigned to Highway Unit No. 2, on or about and between February 28, 2009 and May 29, 2009, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer wrongfully did ingest marihuana without police necessity or authority to do so.

PG 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

2. Said Police Officer Dean Pattona, assigned to Highway Unit No. 2, on or about and between February 28, 2009 and May 29, 2009, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer wrongfully did possess marihuana without police necessity or authority to do so.

PG 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

The Department was represented by David Green, Esq., Department Advocate's Office, and the Respondent was represented by Philip Smallman, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Thomas Cairns as a witness.

Thomas Cairns

Cairns held a Ph.D. in biochemistry, and the higher degree of Doctor of Science in toxicology from the University of Glasgow. He also had a Bachelor of Science degree with honors in chemistry. He was currently the senior scientific advisor for Psychemedics. He was licensed by the New York State Department of Health, "one of the strictest regulating agencies," to practice forensic toxicology. This particularly covered drug testing using hair samples.

Psychemedics itself was also licensed as a laboratory by New York State to conduct hair testing. The lab had been performing hair testing of drugs since 1988. It was also licensed by the State of California and the American College of Pathologists. Psychemedics was "cleared" by the Food and Drug Administration (FDA).

Cairns had published over 20 peer-reviewed papers in the area of hair testing since 1988. He had presented to the Society for Forensic Toxicology and the Society for Hair Testing. He had been in the hair testing business for about 25 years.

The Court deemed Cairns an expert in forensic toxicology, specifically with regard to drug testing of hair.

Cairns testified that when a person ingests a compound like marijuana, it enters the bloodstream and becomes metabolized. Marijuana is converted to a metabolite called carboxy tetrahydrocannabinol, known as carboxy THC or THC acid (THC-COOH or "THC"). Carboxy THC is a human metabolite; it does not exist in marijuana or marijuana smoke, but is produced only through the metabolizing of ingested marijuana in the human liver. The circulatory system brings the THC to the base of the hair follicle; the follicle uses the bloodstream to grow, composing itself of a fibrous material called keratin. As the hair structure grows, it traps any drugs that may be circulating in the bloodstream in the keratin's polymeric structure. The hair is

composed of bundles of strands, like a transatlantic cable, and the drug gets trapped in those strands.

Psychemedics' testing, Cairns stated, focused only on the portion of the hair containing the trapped substance. This trapped substance could not be washed off. Cairns explained that an individual could sweat out the drug through scalp pores, and it would be deposited onto the external surface of the hair. In the testing process, Psychemedics used "an aggressive wash procedure."

Cairns described the general protocol at Psychemedics. The New York City Police Department requires three samples to be collected and placed in three distinct envelopes. Two are sent to Psychemedics and the third retained by the Department. An entire strand of hair is cut as close to the skin as possible. The hair samples arrive at the lab in tamper-evident seals. Each sample has a unique identification number and bar code. If the samples have not been tampered with, the hair is analyzed. Cairns explained that hair grows from the scalp at a rate of half an inch per month, or 1.3 centimeters. If the hair received by the lab is longer than 3.9 cm (three months), it is cut to 3.9 cm. That is, from the root end to the Psychemedics-cut end is 3.9 cm at most, and the rest is discarded. This allows the lab to examine the most recent 90 days of hair growth.

Eight to ten milligrams of hair is then taken and liquefied. This process, known as digestion, dissolves the keratin and releases the trapped drugs. The measure of whether the keratin has been degraded, and the drugs released, without altering the drugs or degrading them, is called efficiency. Cairns stated that Psychemedics was "close to 99 percent efficiency."

The liquid is divided into five test tubes, now with the same bar code. They are subjected to radioimmunoassay (RIA), which uses antibodies to detect reaction. If the amount of drug is at

or above the administrative cutoff, the sample is deemed a "presumptive positive." The cutoff is used to differentiate conservatively a "user" as opposed to someone passively exposed to the drug. The "recognized cutoff in the forensic industry" for marijuana, or cannabinoids more specifically, is 20 picograms per 10 mg of hair. There are 1,000 micrograms in 1 milligram, 1,000 nanograms in 1 microgram, and 1,000 picograms in 1 nanogram. Thus, a nanogram is one billionth of a gram.

Cairns testified that if the RIA detects less than the administrative cutoff, the package is deemed negative and reported back to the Department as negative.

Cairns testified that if the sample is presumptive positive, a new batch of hair is taken and "washed extensively." It is treated with alcohol to remove products like gel. A five-step "buffer wash" is then performed over the course of nearly four hours. The wash procedure essentially is the same as washing one's hair at home with shampoo, except longer. This is important because hair swells when wet, so any drug that reached "below the epidermal layers through the sweat contamination" would be removed from the hair. Thus, after the wash, and the dissolution of the hair, only the trapped drug would remain.

Cairns asserted that Psychemedics' procedure was so effectual that they did an experiment in which they deliberately soaked hair with a drug, and all of it was removed by the second wash.

Cairns testified that in the Psychemedics procedure, the presumptive positive sample goes through mass spectrometry (MS) for confirmation. He explained that radioimmunoassay looks at cannabinoids generally, not THC specifically. MS looks at "exact molecular fingerprints." Every compound in the universe has a different mass spectrum; it is made up of atoms, and "the way those atoms fragment on mass spectrometry" allows the analyst "to form a picture of the

molecules." Cairns testified that Psychemedics used gas chromatography, a more sensitive MS process (GC/MS/MS).

In MS, Cairns testified, the cutoff is 1 pg per 10 mg of hair. Cairns asserted that Psychemedics had performed clinical studies and found that 1 pg/10 mg represented a "recreational" user of marijuana. By "recreational," Cairns meant multiple ingestions per month, once a week for example. By "ingestion," he meant smoking one joint of marijuana. This could vary depending on the potency of the marijuana. Cooking or baking the marijuana, like in a brownie, would lower the potency, and digestion in the stomach would "degrade 50 percent of the dose."

Cairns testified that if the first sample tested by MS is at or above that 1 pg/10 mg cutoff, the lab tests the second sample collected by the Department. If the second sample is at or above that cutoff, the samples are reported back to the Department as positive. If not, "a negative report is sent back to NYPD on the whole package."

Cairns had reviewed and certified Department's Exhibit (DX) 1, the Psychemedics laboratory data package, marked with the subject identification number 8-2567-09-XH. The package indicated the chain of custody during the analysis and that the lab's procedures were followed. Each sample came in a separate security envelope; both were initialed "DP" by the "test subject." Each sample was given a laboratory "accession number" when it was received by Psychemedics. The number for the first sample was 116181975 and 410020309 for the second.

The first sample was collected by the Department on May 29, 2009, and received by Psychemedics on June 2, 2009. The sample was a presumptive positive using RIA. It then proceeded to MS screening, where it tested positive for marijuana. Carboxy THC was detected by MS at 11.4 pg per 10 mg of hair, 11.4 times the cutoff of 1 pg/10 mg.

Cairns stated that the second sample measured 17 pg per 10 mg of hair using the MS cutoff.

Cairns testified that forensically, there was "no significant difference in these two results." The hair samples were shorter than the maximum 3.9 cm – they were 2.5 cm and 2.4 cm, respectively. That rendered a look-back period of a little less than two months. Also, Cairns explained, hair is not a "homogeneous matrix" so there are variances between two samples collected the same day from different areas of the head. "So they are not out of whack. They are in the same ballpark."

Cairns stated that there was a third sample taken from the donor, submitted to another laboratory, Quest Diagnostics (see DX 2, Quest laboratory data package for third sample). The third sample measured 15 pg/1 mg of THC by the gas chromatography method; this, in Cairns' opinion, validated the Psychemedics results because the average of the two Psychemedics samples was 14.2.[1]

On cross-examination, Cairns testified that to his knowledge, Psychemedics had never been wrong on a report submitted to a contractor, at least to the extent that they had never "issued a report that indicated we were wrong." He had been a full-time employee since 1995. Cairns was a salaried employee of the corporation with a "straight forward employment contract" and was not receiving an additional fee for his testimony.

Counsel asked Cairns a question concerning a hypothetical fourth hair sample. The question assumed that hair was collected ten days to two weeks after the first three samples were

[1] The parties stipulated to the chain of custody regarding the following events: on May 29, 2009, three hair samples from the Respondent were collected at the Medical Division. The samples were individually packaged. Two were sent to Psychemedics and the third retained. After the Psychemedics results were reported, the third sample was sent at the Respondent's request to Quest Diagnostics. The parties stipulated that the samples sent to Psychemedics were the subject of the analysis in DX 1. The parties also stipulated that the third sample, sent to Quest, was the subject of the analysis in DX 2.

collected. In the hypothetical, the same length of hair was tested, meaning that the subject had a haircut in the intervening time period to remove the old growth. The question was whether Cairns could accept a fourth test that came back with a result that no THC was present, not just that it was negative by not reaching the cutoff. Cairns could not accept that, but he opined that there was a potential for the result simply to be below cutoff. This was because a recreational user, not needing to smoke every weekend, could abstain "for say a month before the test so that the new growth brought in negative hair" and pushed out the positive hair. The subject could have smoked all the marijuana in the first month, and most of that month would get cut off by the new growth.

Cairns testified that the results of the three tests here suggested knowing ingestion and excluded the possibility of unknowing ingestion.

The Respondent's Case

The Respondent called Max Viknevich as a witness, and testified on his own behalf.

Max Viknevich

Viknevich was the proprietor of New York Paramedical Services. Among other things, his firm collected drug testing specimens for Quest Diagnostics. He had worked with Quest in this regard for about a year and a half and had collected close to 500 specimens for them.

Viknevich testified that on June 12, 2009, he received a telephone call from the Respondent. The Respondent asked what laboratory Viknevich was affiliated with, and if Viknevich could collect his hair "for his own record." Viknevich told him to come in.

Viknevich described his general procedure. He took the donor's driver license information as verification of identity. Viknevich wiped off scissors and cut samples of hair from the donor's head. In court, the witness approximated the length with his fingers; the Court stated that it appeared to be a little more than one inch. Viknevich placed the hair in aluminum foil and put it into an envelope. He sealed the envelope with his own and the donor's signatures, and sent it to the lab (see Respondent's Exhibit [RX] B, collection sheet for specimen ID no. 7680687).

Five or six days later, Viknevich testified, Quest faxed him the results, which he gave to the Respondent. Viknevich identified RX A as the one-page document he received. It referenced specimen identification number 7680687.

On cross-examination, Viknevich stated that he had collected about 100 drug-testing specimens at the time he took the Respondent's samples. He charged $105 for the service.

Viknevich testified that the Respondent said he was a police officer when he arrived at the office, and that he wanted "to have for [the Respondent's] record result of drug test of hair." The Respondent told Viknevich that he had been accused of using drugs.

Viknevich stated that it was his choice to take the samples from the Respondent's head. His hair was about the same length as it was at trial. Viknevich did not know when the Respondent last had gotten a haircut. Viknevich grasped the hair with his fingers and cut the strands below his fingers. He wrote on RX B that the reason for the test was "personal" because the Respondent wanted it "for personal record." The "Follow-up" box on the form was for situations where "somebody had some problem before, and every three, or four, or six months they asking for repeat the results." This generally was a urine test.

The Respondent

The Respondent was 44 years old and had been a member of the Department since 2001. He testified that he had tried marijuana as a teenager, but denied that he "ever knowingly used" marijuana as a member of the Department.

The Respondent testified that he was a [redacted] He had been s[redacted] one year and five days. He attended [redacted] He began drinking at a young age, "rather irresponsibly with a lot of negative consequences." This included becoming so drunk that his girlfriend left him behind on several occasions.

The Respondent got married in 1989 and got divorced in 2006. He had two daughters, now ten and seven years old. He was working in Highway Patrol at the time of the September 11th attacks. His duties after that day included funeral escorts and guarding the temporary morgue. This led to a lot of work-related stress and strain on his home life. [redacted].

The Respondent was devastated by these events. [redacted]. Eventually, "after the stress of everything that I had been through," he began to drink. He did not do so every day, but when he did, he drank to get drunk, and "it was not a good outcome." He had suffered blackouts at times, in which he "consume[d] enough alcohol that you don't . . . remember doing things in an intoxicated state." Someone would have to tell him what happened or where he had been. He had woken up in strange houses; [redacted] told him that on one evening he "did things that I normally wouldn't do or wasn't raised to do in an intoxicated state."

[redacted]

The Respondent testified that he received a notification to submit to a drug test at the Medical Division, and he did so.

The Respondent conceded that in the time frame of April, May and June of 2009, he was drinking once a week. When asked if he smoked marijuana during that time frame, he answered, "Not to my knowledge or knowingly." He stated that he would not have "maliciously, knowingly intentionally put myself in this predicament." He was surprised when he was suspended on June 11, 2009. On the advice of his delegate, the Respondent obtained another test because he felt the Department's results were a mistake. He found Viknevich's firm on the Internet and arranged for a test. He was satisfied with the negative result and felt it was correct.

The Respondent testified that after June 2009, he became sober. He sought help from the Department and received it. [redacted].

On cross-examination, the Respondent stated that he drank [redacted], either on a Wednesday or after the weekend. His drinking would occur once every week or every other week. He denied drinking after he got off duty, but when asked if he would drink "at all after that point," he answered, "Would I? I can't say no. Maybe I would have a beer or a glass of wine. To get drunk, I can't pinpoint any specific day."

When asked whether, after waking up from a blackout, he ever had reason to suspect he "had been around marijuana" or other people that had smoked it, the Respondent replied, "No, not to my knowledge. . . . Not having recollection or knowledge of it." He could not state that he now realized he had been at places where people were ingesting marijuana. He did not recall smelling the distinctive odor of marijuana on his clothing or person after waking up from a blackout.

The Respondent testified that he had two neighbors [redacted] one adjacent and one across the street, that smoked marijuana. He smelled it from his property. He did not believe he spent time with those neighbors during any blackout, although "I know I was intoxicated one time and actually left the residence. They were both there, and I guess because of the commotion, but that's the closest I guess I can say they were around me when I was intoxicated."

When asked if he knew for certain whether he had ingested marijuana between April and June 2009, the Respondent stated, "I am not admitting or denying. I can't give you an answer to that. I wish I could give you a more heartfelt, honest answer."

The Department's Rebuttal Case

The Department recalled Cairns on rebuttal.

Thomas Cairns

Cairns observed that RX A, the fourth-test result, stated that the date of collection was June 12, 2009. Cairns pointed out that the document did not specify the length of hair tested, which would enable him to interpret a timeline.

More importantly, the document noted that the screen cutoff used by the lab was 10 pg of Carboxy THC per 10 mg of hair. Cairns called this "an exceedingly high cutoff." While the Psychemedics screen cutoff was 20 pg/10 mg, that tested all cannabinoids, not just THC. Cairns asserted that he was familiar with Quest Diagnostics, and that the FDA had approved Quest to test only for "chronic" use. By "chronic," Cairns meant multiple uses per week, as opposed to the "recreational" once a week.

Additionally, Cairns pointed out, the "negative" finding on the fourth test meant only that it did not reach the screen. He noted that the third Quest sample, sent by the Department to confirm the Psychemedics results, was tested at the limit of detection. The report stated that the result was "being reported in a quantitative manner only, without reference to administrative cut-off levels" (see DX 2, p. 28). If the fourth-test lab had done a quantitative measure, it would have more credibility.

On cross-examination, Cairns admitted that Quest was a competitor of Psychemedics. He had seen documentation about Quest's procedures on the FDA website, but had not seen any other documentation regarding the Respondent's fourth test in particular.

Upon questioning by the Court, Cairns testified that the fourth-test lab only performed the screen and did not proceed to the confirmation test. This was underscored by the fact that RX A reported results for "MARIJUANA METABOLITE THC-COOH (1 pg/mg SCREEN)."

FINDINGS AND ANALYSIS

The Respondent is charged with possessing and ingesting marijuana without police necessity or authority after a random test revealed the presence of marijuana in his hair. The Court finds the Respondent Guilty of both specifications.

Dr. Thomas Cairns of the Psychemedics Corporation testified that when marijuana is deliberately ingested, it metabolizes in the bloodstream, and is then fed to the hair, where it becomes trapped in the polymeric keratin hair structure. Also trapped as a result of the body's metabolizing the marijuana is the metabolite, Carboxy THC. Cairns testified that THC can only be present as a result of the metabolism of marijuana by the organs of the human body. Cairns also stated that THC was present in the Respondent's hair at levels above the mass spectrometry cutoff. Cairns testified that the results meant that the Respondent had "recreationally" used marijuana during the look-back period covered by the test, approximately 90 days from May 29, 2009, when the hair was collected. This is the period charged in the specifications: February 28, 2009, to May 29, 2009.

The Respondent testified that he was a recovering alcoholic and had been sober for one year and five days at the time of trial. He denied knowingly using marijuana after trying it as a teenager. He noted that he drank in those years as well. The Respondent stated that his drinking developed into alcoholism. This worsened after the September 11th attacks. At times, he had blackouts while drinking; as an alcoholic, he was drinking to get drunk. He conceded his inability to deny the possibility that he might have used marijuana during these blackouts. During the period of April-June 2009, he may have had these blackouts once a week. Again, the 90-day period that, Kearns testified, the hair test examined for presence of drugs was February 28, 2009, to May 29, 2009.

The Respondent also put forward evidence of a fourth hair test. He took this test the day after he was informed that his Psychemedics tests came back positive for the presence of marijuana. He did this by searching the Internet for a testing center. He found New York Paramedical Services and went there. NYPS was owned and administered by Max Viknevich.

Viknevich testified that he cut hair from the Respondent's head – the Court estimated Viknevich's finger demonstration as 1 to 1 ½ inches – placed it in an envelope, and sent the envelope to a Quest Diagnostics laboratory. The Quest lab reported to Viknevich that the hair sample tested negative for drugs.

Cairns' testimony established that the Respondent deliberately ingested marijuana. The two Psychemedics tests and the third Quest test of the Department-taken sample demonstrated that the amount of THC in the Respondent's hair averaged between 14 and 15 pg per 10 mg of hair. At most, the fourth Quest test sent by NYPS stated that the sample showed no THC at or above the lab's administrative cutoff, 10 pg per 10 mg of hair. As Cairns pointed out, that is an extraordinary high screen cutoff for THC, as opposed to the Psychemedics procedure, which screens at 20 pg per 10 mg of hair, but for all cannabinoids, not just the THC metabolite. Further, Cairns explained, this result does not mean that there was no THC in the sample because it was not tested further quantitatively to determine whether mass spectrometry could detect the smallest amount of THC possible. Furthermore, there was no laboratory data package accompanying the fourth test, so the Court cannot assess the lab's methods and procedures. All that was provided was a one-page printout.

The Respondent's counsel argued that the Respondent would have had to hide his marijuana use from his family and co-workers, an impossible task, and that no one came forward to testify that signs of marijuana use were evident. This argument is unconvincing in light of Cairns' testimony that the results demonstrated the Respondent was a recreational user, meaning one joint a week. Such use would not necessarily be evident to an unknowing relative, colleague or friend. Nor did Cairns try to tarnish a competitor laboratory; he simply and correctly pointed out that the fourth test was not as in depth as it should have been under the circumstances.

Because only a screen was conducted, the test could not confirm whether any THC at all was in the sample.

The Respondent's testimony about his alcoholism supported the Department's case. He could not remember what occurred during his blackouts, and stated that he was told afterwards that he did things not in keeping with his values. These blackouts may have occurred once a week – the exact "recreational" frequency that, Cairns estimated, the THC finding of 14-15 pg/10 mg indicated the Respondent was using marijuana. The Respondent's assertion that he never knowingly used marijuana in adulthood is therefore of little value. Under the circumstances, it is quite possible that he knowingly did so but does not currently remember because of the blackouts.

Accordingly, the Court rejects the Respondent's argument and finds that the Department proved through the Psychemedics and third Quest test results that the Respondent ingested marijuana. See Matter of McBride v. Kelly, 215 A.D.2d 161 (1st Dept. 1995) (substantial evidence that officer ingested cocaine was provided by immunoassay and mass spectrometry). Because the Department demonstrated that the Respondent ingested and thus possessed marijuana, without any police necessity or authority, the Court finds him Guilty.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on March 3, 1994. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of the possession and ingestion of marijuana without police necessity or authority. After his drug tests came back positive for the presence of marijuana, the Respondent entered treatment for alcoholism under the auspices of the Department. He was sober for one year and five days as of the date of his testimony, and that is commendable. Nevertheless, this Department has a strong interest in not employing persons who ingest and possess illegal drugs like marijuana. Accordingly, the Court recommends that the Respondent be DISMISSED from employment with the Department. See *Case No. 81455/05*, signed Aug. 3, 2007 (23-year member was terminated from the Department for possessing and ingesting marijuana), confirmed sub nom. Matter of Chiofalo v. Kelly, 70 A.D.3d 423 (1st Dept. 2010); but see Matter of McDougall v. Scoppetta, ___ A.D.3d ___, 905 N.Y.S.2d 262 (2d Dept. 2010).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED
JAN 05 2011
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DEAN PATTONA
TAX REGISTRY NO. 907431
DISCIPLINARY CASE NO. 85554/09

In 2007, the Respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent" on his annual performance evaluation. He was rated 4.0 "Highly Competent" in 2006 and 2008. He has been awarded two medals for Excellent Police Duty and one medal for Meritorious Police Duty. [redacted] The Respondent has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner – Trials